

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**February 7, 2017**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2016AP1534**

**Cir. Ct. No. 2015TR2449**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

---

**IN THE MATTER OF THE REFUSAL OF NICHOLAS W. STERN:**

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**NICHOLAS W. STERN,**

**DEFENDANT-APPELLANT.**

---

APPEAL from a judgment of the circuit court for Door County:  
ROBERT HAWLEY, Judge. *Affirmed.*

¶1 HRUZ, J.<sup>1</sup> Nicholas Stern appeals a judgment finding him guilty of improperly refusing to submit to chemical testing following his arrest for

---

<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

operating a motor vehicle while intoxicated (OWI). Stern argues the officer who arrested him lacked reasonable suspicion to stop his vehicle. We disagree and affirm.

## **BACKGROUND**

¶2 Stern was arrested for first-offense OWI, in violation of WIS. STAT. § 346.63(1)(a). He refused to submit to chemical testing and was therefore issued a notice of intent to revoke operating privilege, pursuant to WIS. STAT. § 343.305(9)(a). Stern timely requested a refusal hearing.

¶3 At the refusal hearing, officer Jason Albertson testified he was on patrol in the early morning hours of November 21, 2015, in the City of Sturgeon Bay. Just before 3:00 a.m., Albertson began crossing the Michigan Street Bridge, traveling from the west side of Sturgeon Bay to the east side. While on the bridge, Albertson observed a vehicle, whose driver was later identified as Stern, “coming in the opposite direction, basically driving down the center of the road.” Albertson testified Stern’s vehicle was over the center line, “[m]ostly in [Albertson’s] lane.” He later clarified the vehicle was “[k]ind of straddling” the center line and appeared to be “about halfway over.”

¶4 Albertson activated his squad car’s red and blue lights, “to kind of warn the driver that, hey, you’re in my lane coming at me.” Stern’s vehicle moved back into its own lane as it approached Albertson. Albertson testified that, had Stern’s vehicle not moved back into its own lane, “[w]e would have had a collision on the bridge.”

¶5 Because Albertson was unable to turn around on the bridge, he proceeded to the east side of Sturgeon Bay, made a U-turn, and then headed west

across the bridge in pursuit of Stern's vehicle. He stopped the vehicle after about a quarter of a mile. Albertson testified Stern admitted during the stop that he had driven over the center line.

¶6 On cross-examination, Albertson clarified that, as he was passing the center span of the bridge, he observed Stern's vehicle "make a wide turn" from First Avenue onto Michigan Street "well over the center line" and continue "over the center line onto the bridge." Albertson confirmed the only reason he stopped Stern's vehicle was for driving left of the center line, and he did not observe any other traffic violation.

¶7 Defense counsel then introduced a video recorded by Albertson's squad car camera. Albertson testified the camera was activated when he turned on his vehicle's red and blue lights, but it actually recorded events beginning an unspecified number of seconds before that point. The video was played for the court, and Albertson identified the point in time when he believed it showed Stern's vehicle crossing the center line, stating, "Right there he's over the center line. Now, as he turns, like I said, there's a big swoop right there. Right there he's starting to go back over the double yellow line right before I turn on my red lights."<sup>2</sup>

¶8 Stern argued the evidence presented at the refusal hearing was insufficient to support the stop of his vehicle. The circuit court disagreed, stating:

Well, the officer testified based upon his training and experience he's on the midnight shift, his observations, and

---

<sup>2</sup> The squad car video is in the record on appeal. Although the video is time-stamped, the transcript of the refusal hearing does not reveal what specific portion of the video corresponds to Albertson's testimony that Stern's vehicle could be seen crossing the center line.

the videotape I think buttressed that, that the—your client, [defense counsel], was in the wrong lane, Nicholas Stern was in the wrong lane of travel coming from the east side here to the west side. And I’m satisfied that the officer had enough probable cause to stop him, and fortunately there wasn’t an accident there.

Accordingly, the court concluded Stern lacked adequate grounds to refuse to submit to chemical testing following his arrest for first-offense OWI.

## DISCUSSION

¶9 On appeal, Stern argues Albertson lacked reasonable suspicion to stop his vehicle.<sup>3</sup> A traffic stop is constitutionally permissible when the officer has reasonable suspicion to believe a crime or traffic violation has been or will be committed. *State v. Popke*, 2009 WI 37, ¶23, 317 Wis. 2d 118, 765 N.W.2d 569. “The officer must be able to point to specific and articulable facts that, taken together with rational inferences from those facts, reasonably warrant the intrusion” of the stop. *State v. Young*, 212 Wis. 2d 417, 423-24, 569 N.W.2d 84 (Ct. App. 1997). “The question of what constitutes reasonable suspicion is a common sense test: under all the facts and circumstances present, what would a reasonable police officer reasonably suspect in light of his or her training and experience.” *Id.* at 424.

¶10 Whether there was reasonable suspicion for a traffic stop is a question of constitutional fact, to which we apply a two-step standard of review. *State v. Post*, 2007 WI 60, ¶8, 301 Wis. 2d 1, 733 N.W.2d 634. We uphold the

---

<sup>3</sup> As noted above, the circuit court concluded Albertson had probable cause to stop Stern’s vehicle. However, in *State v. Houghton*, 2015 WI 79, 364 Wis. 2d 234, 868 N.W.2d 143, which was decided just over four months before the stop of Stern’s vehicle, our supreme court clarified that “reasonable suspicion that a traffic law has been or is being violated is sufficient to justify all traffic stops,” *id.*, ¶30, including stops for “observed violation[s],” *id.*, ¶28.

circuit court’s findings of historical fact unless they are clearly erroneous, but we independently review the application of those facts to constitutional principles. *Id.*

¶11 The circuit court concluded the stop of Stern’s vehicle was constitutionally permissible because Albertson’s testimony and the squad car video established that Stern’s vehicle “was in the wrong lane of travel coming from the east side here to the west side.”<sup>4</sup> Stern argues the video contradicts Albertson’s testimony, in that it conclusively shows Stern “maintained his lane as he traveled across the bridge, and was in his lane of travel as he approached and passed the officer’s squad.” Stern therefore argues the court’s finding that his vehicle was in the wrong lane of travel is clearly erroneous. *See State v. Walli*, 2011 WI App 86, ¶17, 334 Wis. 2d 402, 799 N.W.2d 898 (When “evidence in the record consists of disputed testimony and a video recording, we will apply the clearly erroneous standard of review when we are reviewing the [circuit] court’s findings of fact based on that recording.”).

¶12 Having independently reviewed the squad car video, we conclude the circuit court’s finding that Stern operated his vehicle in the wrong lane of travel is not clearly erroneous. Contrary to Stern’s assertion, the video does not conclusively show that Stern operated his vehicle in the correct lane at all times. Consequently, we cannot conclude the circuit court’s finding that the video showed Stern’s vehicle crossing the center line is clearly erroneous. “[A] factual finding is not clearly erroneous merely because a different fact-finder could draw

---

<sup>4</sup> *See* WIS. STAT. § 346.05(1) (requiring vehicle operators to drive on the right half of the roadway, subject to certain exceptions, none of which are applicable here); *see also State v. Popke*, 2009 WI 37, ¶¶17-18, 317 Wis. 2d 118, 765 N.W.2d 569 (holding that crossing the center line, even momentarily, constitutes driving left of center and therefore violates § 346.05(1), provided none of the statutory exceptions apply).

different inferences from the record.” *State v. Wenk*, 2001 WI App 268, ¶8, 248 Wis. 2d 714, 637 N.W.2d 417.

¶13 Moreover, the circuit court’s ultimate finding that Stern’s vehicle crossed the center line was also based on Albertson’s testimony, which the court implicitly found credible. *See Derr v. Derr*, 2005 WI App 63, ¶40, 280 Wis. 2d 681, 696 N.W.2d 170 (when an express finding is not made, we normally assume the circuit court made findings in a manner that supports its final decision). The court’s implied finding regarding Albertson’s credibility is not “inherently or patently incredible or in conflict with the uniform course of nature or with fully established or conceded facts,” and, accordingly, we are not free to disregard it. *See Yates v. Holt-Smith*, 2009 WI App 79, ¶25, 319 Wis. 2d 756, 768 N.W.2d 213.

¶14 In short, the circuit court’s factual finding that Stern operated his vehicle in the wrong lane of traffic is not against the great weight and clear preponderance of the evidence and, thus, is not clearly erroneous. *See State v. Arias*, 2008 WI 84, ¶12, 311 Wis. 2d 358, 752 N.W.2d 748. Based on that finding, we conclude Albertson could reasonably suspect Stern committed a traffic violation—namely, a violation of WIS. STAT. § 346.05(1). Stern does not dispute that, if reasonable suspicion supported the stop of his vehicle, his refusal to submit to chemical testing following his arrest for first-offense OWI was unreasonable. We therefore affirm the judgment of conviction.

*By the Court.*—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

